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The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai,

We are writing in response to the Federal Communications Commission's ("FCC") Public Notice seeking comment on the interpretation of the Telephone Consumer Protection Act. I am the founding partner of Tycko & Zavareei LLP, a private public interest law firm that represents small businesses, consumers, and whistleblowers. As a public-interest law firm, Tycko & Zavareei LLP has years of experience bringing class action cases against violators of the TCPA on behalf of Americans suffering from the invasion of privacy and loss of peace of mind resulting from excessive and unwanted calls and texts.

Congress passed the TCPA twenty-five years ago to protect consumers from runaway telemarketing that was threatening the privacy of Americans through new technologies. Senator Fritz Hollings, one of the TCPA's original sponsors, eloquently explained the need for the TCPA: "Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30821–30822 (1991). The reasons undergirding the TCPA apply with equal strength today to modern telecommunications and telemarketing

Indeed, the TCPA was deliberately broad and flexible, drafted in such a way that it would allow the FCC to protect consumers as telecommunications technology advanced. Today, Americans rely more and more on their cellular telephones and smart phones, which have become our last bastion of privacy. Americans closely guard their cell phone numbers, which are generally not listed and not publicly available. But some businesses believe that they should have the right to reach into people's pockets and call them or text them on the numbers that they reserve for family, friends, medical emergencies, and other important personal and business matters.

Fortunately, the FCC has determined that the requirements of the TCPA cover cell phones. As such, private enforcement of the TCPA has served as one of the only bulwarks against bombardment of unwanted calls. If businesses want to reach their own consumers, all they need to do is obtain consent—which is a complete defense to all TCPA actions. The TCPA

was enacted to put restrictions on how far businesses may go into our private spaces—our workplaces, our cars, our bedrooms. These important and effective privacy protections should not be relaxed—if anything, they should be fortified to provide greater protection of privacy.

Recently, however, the D.C. Circuit Court of Appeals struck down key provisions of a 2015 FCC Omnibus Declaratory Ruling and Order that provided protection to consumers targeted by automated dialing telephone systems ("ATDS") and other invasive and annoying industry practices. The court's interpretation endangers all of the major protections that preserve consumers against unwanted robocalls, and we respectfully request that you adopt the following safeguards to prevent this outcome:

1) **Ensure that robocalls and texts generated by an automated dialing telephone system (ATDS) that also use a live caller are covered under the TCPA.**

We understand that some in the industry are asking for a definition of ATDS that a) would exclude most if not all systems in use, and b) would mean, among other things, that all automated calls using a live person would not be covered by the TCPA — and thus would be ungoverned and unstoppable. This would also mean that no texts would be covered by the TCPA. In short, Americans would be bombarded with unwanted text messages and unwanted call volume would only increase. So many Americans already don't answer their phones when they don't recognize numbers in fear that the calls are from spammers, which means that they also sometimes are missing emergency calls or other wanted calls. This is a huge frustration for so many people we talk to and have represented.

As explained by Senator Nelson, "There are few things that unite Americans more than their visceral dislike of robocalls. Go anywhere in this country and ask the average consumer: Do you want to receive more unwanted robocalls? How about more robocalls on your mobile phone? You may just get a mobile phone thrown at you." Statement of Ranking Member Senator Bill Nelson, May 18, 2016 hearing, The Telephone Consumer Protection Act at 25: Effects on Consumers and Business. In light of the massive numbers of consumer complaints about robocalls and unsolicited text messages, now is not the time to relax the strictures of the TCPA. As Congressman Frank Pallone, Jr. wrote in connection with a 2016 House Energy and Commerce Committee hearing on the TCPA, consumers still receive 2.6 billion robocalls per month. And in 2016, the FCC and FTC received almost 4 million complaints about robocalls and telemarketing. That number has only increased in the intervening years, and defining ATDS as including robocalls that also use a live caller is critical to ensuring the number doesn't balloon even more.

2) Allow consumers to revoke consent from unwanted robocalls in any reasonable way.

We understand that some in the industry are asking for a rule that if the consumer consented to automatic calls in a contract, then that *consent can never be withdrawn*. This would mean that all debt collection and many telemarketing automated calls could never be stopped. Not allowing Americans to revoke their consent to robocalls would be a draconian measure that would seriously invade consumers' privacy. The TCPA intentionally does not prevent legitimate business from using robocalls and text messages to reach their consumers *if the consumers actually want to receive them*. This should be the standard. The TCPA is sufficiently narrow. Most legitimate businesses know the rules and are playing by them. If Congress takes away those guardrails, the current deluge of calls and texts will multiply exponentially.

Moreover, in our long tenure representing consumers, it is clear that many do not fully read or understand the contracts they sign when purchasing a product or service. Americans should be able to make their own decision as to whether or not they want to accept robocalls at the time they occur.

We also understand that some student loan servicers are suggesting that consumers who owe debts to the federal government should never be able to stop calls to their cell phones to collect that debt. But a look at the practice of Navient Solutions, Inc. ("Navient") counters against such a proposal. As part of its student loan collection business, Navient aggressively contacts student loan holder (and others who Navient falsely believes are student loan holders) as part of its collection efforts. Navient deliberately engaged in a campaign of harassing and abusing consumers through the use of repeated, unconsented-to robocalls, calling consumers' cell phones hundreds, and—in some cases—thousands of times after being asked to stop. Many of these calls occur multiple times a day, often numerous times a week. These calls are frequently made to consumers while they are at work, even after they have explicitly explained to Navient that they cannot accept personal calls at work. Indeed, Navient's internal policies permit up to eight calls per day in the servicing of student loan debt. Since 2014, there have been over 18,389 complaints reported to the CFPB just about Navient's practices. In one class action, the plaintiffs allege that that Navient "placed 9,688,533 autodialed calls to 276,874 unique cellular telephone numbers, from May 4, 2011 through May 4, 2015, after its own records included a wrong number designation for each of them. In other words, during a recent four-year period, Navient placed over nine million autodialed calls to over a quarter of a million cellular telephone users or subscribers, each of whom previously informed Navient they did not want to receive calls from it. And during the same time period, Navient used an artificial or prerecorded voice in connection with autodialed calls it placed to 123,371 cellular telephone numbers it earlier labeled as wrong numbers." Johnson v. Navient Solutions, Inc., Case No. 1:15-cv-0716-LJM-MJD (S.D. Ind. filed May 4, 2015), Plaintiff's Summary Judgment Motion.

Navient's behavior demonstrates what happens when legitimate businesses believe that they have carte blanche to bombard our telephones with robocalls: they bombard our telephones with robocalls.

3) **Require callers to have the consent of the persons they reach, not the consent of the person they are intending to call.**

Finally, we understand that some in the industry are urging the FCC to allow them to make calls to numbers, even after they have been reassigned to other consumers. This would deprive individual Americans of the choice as to whether or not to accept these calls. Just because a caller has the consent of the person he or she is trying to call, is not sufficient. For example, if a caller repeatedly reaches the wrong person, who asks the caller to cease calling, that caller has plainly been put on notice that the calls are undesired by the recipient. That should be enough. If anything, the TCPA should be expanded, to make it harder—not easier—for businesses to bombard consumers with unwanted robocalls. As we all know from personal experience, the number of unwanted robocalls has just been increasing to the frustration of *all* Americans.

Thank you for your attention to this important matter.

Sincerely,

Hassan A. Zavareei
on behalf of Tycko & Zavareei LLP

The Honorable Ajit Pai
Chairman